FAX TRANSMISSION

GILBERTI STINZIANO HEINTZ & SMITH, P.C.
555 East Genesee Street
Syracuse, New York 13202
(315) 442-0100
Fax: (315) 442-0169

CONFIDENTIALITY NOTICE

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To:	U.S. Department of Energy Office of Electric Delivery and Energy Reliability ATTN: Docket No. 2007-OE-01	**Date:**	November 3, 2007
Fax #:	(202) 586-8008	**Pages:**	**35,** including this cover sheet.
From:	Kevin C. Murphy		
Subject:	Request for Rehearing		

Following is a copy of the Application for Rehearing on behalf of Communities Against Regional Interconnect, Broome County, New York, Madison County, New York and Orange County, New York.

The original Application along with attachments will be hand delivered on Monday, November 5, 2007.

Inquiries can be made to Karen Hawkins at 315-442-0186

CLIENT/MATTER NO: **NYSA01-50089**

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Gilberti Stinziano Heintz & Smith, P.C.
ATTORNEYS AND COUNSELORS AT LAW

555 East Genesee Street
Syracuse, New York 13202-2159
Telephone: (315) 442-0100
Telefax: (315) 442-0106
E-mail: emailroom@gilbertilaw.com

November 5, 2007

Via Hand Delivery
Office of Electricity Delivery and Energy Reliability, OE-20
U.S. Department of Energy
1000 Independence Avenue, SW
Washington, DC 20585

Attn: Docket No. 2007-OE-01

Gentlemen:

Please find enclosed an Application for Rehearing with respect to Docket No. 2007-OE-01 submitted on behalf of Communities Against Regional Interconnect, Broome County, New York, Madison County, New York and Orange County, New York.

Very truly yours,

GILBERTI STINZIANO HEINTZ & SMITH, P.C.

Kevin C. Murphy

KCM/djs
Enclosure
cc: Communities Against Regional Interconnect
Broome County, New York
Madison County, New York
Orange County, New York

United States of America
Department of Energy

IN RE: REPORT AND ORDER DESIGNATING THE MID-ATLANTIC AREA NATIONAL INTEREST ELECTRIC TRANSMISSION CORRIDOR PURSUANT TO THE ELECTRICITY MODERNIZATION ACT OF 2005

Docket No. 2007-OE -1

November 5, 2007

APPLICATION FOR REHEARING ON BEHALF OF COMMUNITIES AGAINST REGIONAL INTERCONNECT, BROOME COUNTY, NEW YORK, MADISON COUNTY, NEW YORK AND ORANGE COUNTY, NEW YORK

On October 5, 2007 the Department of Energy (the "Department" or "DOE") issued a Report and Order in Docket No. 2007-OE-1 designating a Mid-Atlantic Area National Interest Electric Transmission Corridor (the "Mid-Atlantic NIETC") pursuant to Subtitle B (Transmission Infrastructure Modernization) of the Electricity Modernization Act of 2005 (the "Modernization Act") (the "Final Rule").[1]

Pursuant to 16 U.S.C. section 8251 and as detailed below, Communities Against Regional Interconnect; Broome County, New York, individually; Madison County, New York, individually; and Orange County, New York, individually (collectively "CARI") request (1) rehearing on the Final Rule, (2) a stay of the Final Rule until such time that the Department takes final action with respect to (a) this application and (b) any subsequent rehearing, and (3) the Department's abrogation and set aside of the Final Rule in its entirety.

CARI requests rehearing, and respectfully submits the Final Rule should be abrogated in its entirety, because the designation of the Mid-Atlantic NIETC was arbitrary, capricious, unwarranted by the facts, in excess of statutory authority, otherwise not in accordance with law and without observance of the procedure required by law. Specifically,

1. In promulgating the Final Rule, the Department failed to abide by the requirements of the Administrative Procedure Act;

[1] Codified at Section 216 of the Federal Power Act, Section 313 of the Federal Power Act "FPA".

2. In promulgating the Final Rule, the Department failed to abide by the requirements of the National Environmental Policy Act;

3. In promulgating the Final Rule, the Department failed to abide by the requirements of the Endangered Species Act;

4. As promulgated, the Final Rule constitutes an overbroad designation in violation of the presumption against federal preemption.

5. As evidenced by the Mid-Atlantic NIETC designation, the Department's interpretation of the Modernization Act does not give effect to the unambiguously expressed intent of Congress and/or goes beyond the meaning the Modernization Act can reasonably bear in that:

   - The Department failed to adequately consult with and consider alternatives and recommendations from interested parties, including affected states and "appropriate regional entities".

   - The Department failed to adequately consider State mechanisms already in place and operating to relieve transmission congestion in the State of New York.

   - The Mid-Atlantic NIETC is based on a "sink-and-source" theory that impermissibly focuses on potential responses to congestion rather than the problem of congestion.

   - None of the statutory considerations in Section 216(a)(4) of the Federal Power Act ("FPA") warrant the Department's designation of the Mid-Atlantic NIETC.

6. The Final Rule is not supported by substantial evidence in that:

   - The Mid-Atlantic NIETC is based on out-of-date and incomplete data and erroneous interpretations and analyses.

   - In promulgating the Final Rule, the Department failed to show an "adverse effect" on consumers in the State of New York.

Introduction

This application for rehearing is submitted by and on behalf of CARI, its seven County government and five public interest organization members, and their individual constituents and members; Broome County, New York, individually; Madison County, New York, individually; and Orange County, New York, individually, in response to the Department's Final Rule designating the Mid-Atlantic NIETC.

On July 6, 2007, CARI, on behalf of itself and its individual members, filed written comments in response to the Department's May 7, 2007 Notice seeking written and oral comment on proceedings "that may lead to one or more orders designating one or more national interest electric transmission corridors" and thus, CARI and its individual members became parties to the proceedings under Docket No. 2007-OE-1 and "eligible to file a request for rehearing ... of any final order." 72 Fed. Reg. 25838.

Broome County, New York, Madison County, New York and Orange County, New York did not file individual comments with respect to the proposed and now designated Mid-Atlantic NIETC and each makes this application for rehearing pursuant to the Administration Procedure Act, 5 U.S.C. section 553(e), which requires that "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."

Background

CARI is a domestic non-profit organization comprised of seven New York counties and five public interest organizations formed to promote the conservation of natural resources, including scenic and aesthetic resources and natural beauty; to protect the environment, including wildlife habitat, flora and fauna, and other biological values; to preserve historic sites, including those containing archaeological or cultural resources; and to promote the orderly development of the areas in which New York Regional Interconnect, Inc. ("NYRI") has proposed to locate a 190-mile in-state electric transmission line. The members that comprise CARI are:

Madison County, on behalf of the citizens thereof;
Broome County, on behalf of the citizens thereof;
Chenango County, on behalf of the citizens thereof;
Delaware County, on behalf of the citizens thereof;
Oneida County, on behalf of the citizens thereof;
Orange County, on behalf of the citizens thereof;
Sullivan County, on behalf of the citizens thereof;
Upstate New York Citizens Alliance;
Upper Delaware Council;
Upper Delaware Preservation Coalition;
Say No 2 NYRI; and
STOP NYRI, Inc.

NYRI has filed an application before the New York State Public Service Commission ("NYPSC") for a certificate of environmental compatibility and public need under New York State Public Service Law, Article VII, for construction of a 190-mile 400kV electric transmission line proposed to be located between Marcy, New York (Oneida County) and New Windsor, New York (Orange County).[2] The proposed line, if built, will traverse the other five counties that are members of CARI and will directly

[2] *See* NYRI's Article VII Application for Certificate of Environmental Compatibility and Public Need (May 31, 2006), *available at* http://www.nyri.us/HTML_Site/article7.html.

affect the residents of those counties and members of the public interest organizations within CARI, all of whom are customers served by the existing electricity transmission system.

NYRI submitted a request for early National Corridor designation in response to a Notice of Inquiry issued by the DOE in the Federal Register on February 2, 2006.[3] That request was denied. In response to the DOE's National Electric Transmission Congestion Study ("Congestion Study") and Notice of Inquiry with respect to its Congestion Study, issued on August 8, 2006,[4] NYRI also submitted comments on October 10, 2006, requesting that the DOE designate a National Corridor around its proposed 190-mile transmission line.[5] As designated, the Mid-Atlantic NIETC includes each of the seven New York counties that are members of CARI. Thus, CARI and each of its individual members has a substantial interest in the designation of the Mid-Atlantic NIETC.

I. DOE Was Required to Abide by all Statutory Prerequisites Prior to Designating the Mid-Atlantic NIETC.

As a federal agency, not only must DOE comply substantively with the requirements of the organic statute that grants it the authority to act, it also is subject to the requirements of the Administrative Procedure Act ("APA"), the National Environmental Policy Act ("NEPA") and the Endangered Species Act ("ESA"). Here, the designation of the Mid-Atlantic NIETC constituted a rulemaking proceeding and thus, triggered the notice and comment procedures of the APA. The designation of the Mid-Atlantic NIETC also was a major federal action significantly affecting the quality of the human environment, and thus, required compliance with NEPA. Lastly in this regard, the designation of the Mid-Atlantic NIETC was plainly an "agency action" that, pursuant to the ESA obligated the Department to consult with the United States Fish and Wildlife Service prior to promulgating the Final Rule.

A. DOE's Designation of the Mid-Atlantic NIETC Was a Rulemaking Required to Comply with the APA.

In its proposed designation of the Mid-Atlantic NIETC, the Department stated that "although the [Federal Power Act] does not require it, allowing an opportunity for comment on draft National Corridor designations prior to the Department issuing its FPA section 216(a) report will aid both the public and the Department."[6]

The designation of the Mid-Atlantic NIETC is a "rule" for purposes of the APA, as it is forward-looking and will have future effect, affecting the rights of potential applicants for transmission line siting within the Mid-Atlantic NIETC and the rights of

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[3] 71 Fed. Reg. 5,660 (Feb. 2, 2006).
[4] National Electric Transmission Congestion Study, *available at* http://nietc.anl.gov/documents/docs/Congestion_Study_2006_9MB.pdf (hereinafter "Congestion Study"); Notice of Inquiry, 71 Fed. Reg. 45,047 (Aug. 8, 2006).
[5] *See* Comments of New York Regional Interconnect, Inc. in Response to Request for Comments Concerning Designation of National Corridors (Oct. 10, 2006).
[6] *Id.* at, 25,838.

the citizens of the states and counties in which the Corridor lies.[7] Under the provisions of the APA, when engaging in rulemaking, an agency must formally propose a rule in the Federal Register and provide notice and an opportunity for interested parties to comment or "participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation."[8]

The purpose of the APA's notice and comment procedures is to allow interested members of the public to communicate information, concerns and criticisms to an agency during the rulemaking process; if notice of a proposed rulemaking fails to provide an accurate picture of reasoning that has led the agency to a proposed rule, interested parties will not be able to comment meaningfully upon the agency's proposals.[9] Indeed, the agency must disclose all files or reports it deems relevant to the proceeding to ensure that interested parties have meaningful opportunity to participate in agency proceedings and that the court has an adequate record from which to determine whether the agency properly performed its functions.[10]

The APA further requires that once public comments are provided, an agency must consider all relevant comments and then, incorporate a "concise general statement" of the rule's "basis and purpose."[11] This means that the agency must adequately consider public comments and provide a reasoned response to significant points raised by the public, if not a response to each individual comment. Otherwise, the opportunity for comment would be meaningless.[12] Rules have been struck down where an agency began finalizing a rule before the expiration of the period for public comment ended.[13] Thus, where it is clear that an agency has already made up its mind and has not adequately considered the public comments received, a court may hold that the agency did not properly comply with the APA and invalidate the rule.

Finally, the APA requires that "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." Thus, to the extent the Department denies the application for rehearing or precludes the participation of Broome

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[7] Specifically, designation of a National Corridor may create substantial rights with regard to applicants for siting transmission lines within the corridors, *i.e.*, the designation of the corridor allows such applicants to bypass state siting procedures if the state has "withheld approval" of the siting beyond a year after designation and also confers federal jurisdiction with respect to eminent domain. FPA § 216(b), (e), codified at 16 U.S.C. § 824p(b), (e). For the same reasons, the designation would also substantially affect the rights of the states and citizens of those states in which the corridor is designated since if the state siting process is bypassed and eminent domain authority is given to the transmission line applicant, then the rights of the states and its citizens to have a say over where the transmission line will be sited and how it will be built may be compromised.

[8] 5 U.S.C. § 553(b), (c); *see also Riverbend Farms Inc. v. Madigan*, 958 F.2d 1479, 1486 (9th Cir. 1992) ("It is a fundamental tenet of the APA that the public must be given some indication of what the agency proposes to do so that it might offer meaningful comment thereon.").

[9] *Connecticut Light & Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525 (D.C. Cir. 1982).

[10] *Abbott Laboratories v. Young*, 691 F. Supp. 462 (D.D.C. 1988).

[11] 5 U.S.C. 553(c).

[12] *St. James Hosp v. Heckler*, 760 F.2d 1460 (7th Cir. 1985); *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977).

[13] *Lloyd Noland Hosp. & Clinic v. Heckler*, 619 F. Supp. 1 (N.D. Ala. 1984).

County, New York; Madison County, New York; Orange County, New York or any other similarly situated party that did not submit comments in response to the May 2007 Notice by July 6, 2007, the Department will be acting in direct contravention of the requirements of the APA.

B. DOE's Designation of the Mid-Atlantic National Corridor Was a Major Federal Action Required to Comply with the National Environmental Policy Act.

The National Environmental Policy Act ("NEPA")[14] requires that federal agencies undertake environmental review of all "major federal actions significantly affecting the quality of the human environment."[15] The Department's October 5, 2007 Final Rule asserted that NEPA was not applicable because "National Corridor designations have no environmental impact" and alternatively contended that compliance with NEPA was not required because "States can still permit transmission facilities, just as they have already done." 72 Fed. Reg. 57022 (October 5, 2007).

In promulgating the Final Rule and designating the Mid-Atlantic NIETC DOE has ignored the clear language of NEPA and its implementing regulations as well as the broad interpretation that courts have given to NEPA. The Council on Environmental Quality ("CEQ")'s implementing regulations define a "major federal action" to not only include approval of specific projects, but also: (1) an agency rule promulgated under the APA; (2) an agency plan which "guide[s] or prescribe[s] alternative uses of federal resources" and "upon which future agency actions will be based," and (3) the first step of a "group of concerted actions to implement a specific policy or plan" or the first of "systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive."[16] Designation of the Mid-Atlantic NIETC fits within each of the above categories.[17]

The D.C. Circuit explained in *Scientists' Institute for Public Information, Inc. v. Atomic Energy Comm'n* that the statute was intended to be interpreted broadly:

> The statutory phrase "actions significantly affecting the quality of the environment" is intentionally broad,

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[14] 42 U.S.C. § 4321 *et seq.*

[15] 42 U.S.C. § 4332(2)(C).

[16] 40 C.F.R. § 1508.18(b)(1)-(3).

[17] Such agency action may be excepted from NEPA compliance where a statute contains the "functional equivalent" of NEPA's review process or where there is a clear and unavoidable conflict between NEPA and a statute. *See, e.g., Limerick Ecology Action, Inc. v. U.S. Nuclear Regulatory Comm'n*, 869 F.2d 719, 729-30 (3d Cir. 1989); *Environmental Defense Fund, Inc. v. EPA*, 489 F.2d 1247, 1256 (D.C. Cir. 1973); *Davis v. Morton*, 469 F.2d 593, 598 (10th Cir. 1972). Nothing in Section 216 of the FPA, however, provides for the functional equivalent of or conflicts with NEPA; rather Section 216(j)(1) provides: " nothing in this section affects any requirement of an environmental law of the United States, including the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.)." FPA § 216(j), codified at 16 U.S.C. § 824p(j). An agency action may also be exempt from NEPA due to a "categorical exclusion" under a particular agency's NEPA implementing regulations. DOE's implementing regulations do not contain an exclusion relevant to the designation of a National Corridor. *See* 10 C.F.R. § 1021.410.

> reflecting the Act's attempt to promote an across-the-board adjustment in federal agency decision making so as to make the quality of the environment a concern of every federal agency. The legislative history of the Act indicates that the term "actions" refers not only to construction of particular facilities, but includes "project proposals, proposals for new legislation, regulations, policy statements, or expansion or revision of ongoing programs . . ." Thus there is "Federal action" within the meaning of the statute not only when an agency proposes to build a facility itself, but also whenever an agency makes a decision which permits action by other parties which will affect the quality of the environment.[18]

In *Scientists' Institute*, which involved the environmental review of the Atomic Energy Commission's liquid metal fast breeder reactor program, the court specifically rejected the argument that environmental review need not take place just because a particular facility is not being built:

> The Department takes an unnecessarily crabbed approach to NEPA in assuming that the impact statement process was designed only for particular facilities rather than for analysis of the overall effects of broad agency programs. Indeed, quite the contrary is true. "Individual actions that are related either geographically or as logical parts in a chain of contemplated actions may be more appropriately evaluated in a single, program statement . . . It ensures consideration of cumulative impacts that might be slighted in a case-by-case analysis. And it avoids duplicative reconsideration of basic policy questions. . . ."[19]

Other courts have also recognized that compliance with NEPA demands that environmental issues be considered at every important stage in the decision-making process, even when developing a plan that will later entail individual projects.[20] Indeed, CEQ's implementing NEPA regulations specifically contemplate that a programmatic environmental review should be undertaken at the time that an overall program is put in place, with site-specific environmental review to occur later.[21]

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[18] 481 F.2d 1079, 1088-89 (D.C. Cir. 1973) (citations omitted).

[19] *Scientists' Institute*, 481 F.2d at 1087-88 (quoting the Council on Environmental Quality's Memorandum to Federal Agencies on Procedures for Improving Environmental Impact Statements (May 16, 1972)).

[20] *See Calvert Cliffs Coordinating Committee, Inc. v. Atomic Energy Commission*, 449 F.2d 1109 (D.C. Cir. 1971); *see also Environmental Defense Fund v. Adams*, 434 F. Supp. 403 (D.D.C. 1977) (where the preparation of a national airport plan triggered NEPA even though there would be individualized projects approved later).

[21] *See* 40 C.F.R. § 1508.28 ("Tiering is appropriate when the sequence of statements or analyses is: (a) From a program, plan, or policy environmental impact statement to a program, plan, or policy statement or analysis of lesser scope or to a site-specific statement or analysis.").

Outside the context of programmatic environmental review, a commitment to perform NEPA review in the future has also been rejected as a way of satisfying NEPA requirements at the present time. In *Sierra Club v. United States*,[22] involving the grant of an easement for a road to be used in a proposed expansion of a gravel mining operation, the DOE contended that it would take a "hard look" at the environmental consequences of building the road at the time the location of the road was known and that NEPA review undertaken any earlier would be fraught with speculation and uncertainty. The court, however, held that while DOE's assurances of future NEPA review possessed a "certain pragmatic appeal, DOE's failure to consider and evaluate the mine's impacts on the environment at the time the easement was issued was arbitrary and capricious."[23]

Thus, DOE's attempt to justify its failure to undertake environmental review prior to designating the Mid-Atlantic NIETC because the designation itself does not require any facility to be built, because "all proposals for Federal siting permits will be subject to project-specific NEPA review,"[24] and because "States can still permit transmission facilities" is plainly in error. Nor can DOE's contention that a National Corridor designation does not result in any "ground-breaking" or "foreseeable" environmental impacts justify DOE's failure to comply with NEPA.

Even if it could be argued that the designation of the Mid-Atlantic NIETC will not immediately affect the environment, it clearly "permits action by other parties which will affect the quality of the environment," as it is the triggering step that will permit at least two actions affecting the quality of the environment: (1) it will permit private transmission companies to seek approval from the Federal Energy Regulatory Commission ("FERC") to site their transmission facilities rather than state or local regulatory bodies and (2) it will provide such companies with the power to take private property for right-of-way over the objections of private property owners. As a result of these actions, the quality of the environment will change over hundreds of square miles.

In fact, the Secretary's contention that corridor designations "are only designations of geographic areas in which DOE has identified electric congestion or constraint problems" suggests such a critical misreading of the plain language of the Modernization Act and the unambiguously expressed intent of Congress that the Final Rule must be abrogated in its entirety as the premise upon which it was constructed utterly fails. The apparent error the Department has made is to confuse and fail to distinguish between the direction of Congress to issue tri-annual reports on the existence or status of transmission congestion and the separate and distinct grant of discretion to promulgate a rule or rules of general applicability intended to address the findings of any such report.

A poignant example of the type of environmental impacts that result from DOE's Final Rule is a 190-mile above ground 1,200 megawatt high-voltage transmission line

[22] 255 F. Supp.2d 1177, 1186 (D. Colo. 2002).
[23] *Id.*
[24] *Id.*

proposed by New York Regional Interconnect ("NYRI"), which, if constructed, would run through eight New York counties and 38 municipalities, and which would cross or run along side approximately 154 streams, 98 mapped state wetlands, 156 potential federal wetlands, 265 archaeological sites, 66 properties listed on the National Register of Historic Places, and a National Heritage Corridor as well as various state parks, forests, and forest preserves, agriculture districts, scenic byways, recreational trails, wildlife management areas, lakes, ponds, aquifers, and rivers, including a federally designated wild and scenic river.

NYRI has identified several areas where its proposed route would cross or run parallel to the federally designated and protected Upper Delaware Scenic and Recreational River and within the boundaries of its protected management area. This river corridor was designated by Congress in 1978 for its exceptionally high scenic, recreational and ecological values and consists of the river itself as well as the D&H Canal, a National Historic landmark, and the Delaware Aqueduct, a National Civil Engineering Landmark. This 73.4 mile river corridor is home to numerous threatened and endangered plant and animal species. It supports a world-class trout fishery and is recognized by the Audubon Society as an Important Bird Area. At least 300,000 fishermen, bird watchers and tourists visit the corridor each year.[25] NYRI's proposed route would add 65 to 135-foot high transmission support structures every 300 to 1500 feet within the scenic viewshed of this area. In some areas, the proposed line would be constructed less than a mile away from the river itself.[26]

NYRI has also indicated that its proposed 190-mile line would require the clearing of vegetation in an area of 100 to 150 feet in width along certain parts of the proposed route. Up to a third of an acre of vegetation would be cleared for each of two planned transition stations and up to 40 acres would be cleared for each of two planned AC/DC converter stations.[27] Not only that, but a portion of NYRI's proposed line would actually be constructed in the Mongaup Valley Wildlife Management Area, a 12,000 acre area in Sullivan County, New York known for hosting one of the largest Bald Eagle wintering sites in the State, and which also supports several active eagle nests, as well as other rare wildlife species and species of special concern, including the Red-Shouldered Hawk, Cerulean Warbler, Timber Rattlesnake and Spotted Salamander. Portions of the site have been designated as a state Bird Conservation Area. Mongaup Valley is also a popular area for hiking, scenic viewing, boating, bird watching, cross-country skiing, snowshoeing, hunting, fishing and trapping.[28] For its transmission line, NYRI proposes clearing a third of an acre of vegetation within this wildlife management area for a transition station, and an area stretching 1,200 feet where a cable would be placed under the Rio Reservoir.[29]

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[25] *See* Comments of Upper Delaware Council on the DOE Congestion Study (Oct. 5, 2006); *see also,* NYRI's Article VII Application, *supra,* n.2, Ex. 4 at 40.

[26] *See,* NYRI's Article VII Application, *supra,* n.2, Ex. 4 at 40, Ex. E-1.

[27] *Id.,* Ex. 4 at 16-20, App. H.

[28] *Id.*, Ex. 4 at 45; *see also* NYSDEC, Mongaup Valley BCA Management Guidance Summary, *available at* http:www.dec.ny.gov/animals/27139.html.

[29] *See,* NYRI's Article VII Application, *supra,* n.2, Ex. 4 at 18-20.

NYRI's proposed route will also cross or run adjacent to other significant New York State lands, including those in Forest Preserve counties, such as Sullivan County, which are required to be "forever kept as wild" under the New York State Constitution, and in non-Forest Preserve counties, that are also protected under the State Constitution from certain alienation or development without special legislation. These are but a few of the environmentally sensitive and scenic areas that could be impacted by just one proposed transmission line within the draft Mid-Atlantic Area National Corridor. Hundreds of other such natural resources are located in the wide-ranging Mid-Atlantic Area National Corridor that is proposed to cover nearly two-thirds of New York, all of New Jersey and a good portion of Virginia, Pennsylvania, Delaware, Maryland, West Virginia, Ohio and the District of Columbia.

Those impacts and the similar in nature impacts that exist throughout the entire expanse of the Mid-Atlantic NIETC were required to be addressed prior to promulgating the Final Rule. The law requires, at the very least, that DOE should have prepared a programmatic NEPA review prior to designation that addressed the impacts of corridor designation and alternatives to corridor designation. If, and when, individual transmission projects are considered for siting approval by FERC, more specific NEPA review will then be required, but that does not excuse DOE from fulfilling the requirements of NEPA today.

C. DOE's Designation of the Mid-Atlantic NIETC Was An Agency Action Mandating Compliance With The Consultation Prerequisites of the Endangered Species Act.

Section 7(a)(2) of the Endangered Species Act (ESA) requires that all federal agencies shall, "in consultation with" the United States Fish and Wildlife Service (FWS), "insure that any action *authorized*, funded, or carried out" by the agency "is not likely to jeopardize the continued existence of any threatened or endangered species." 16 U.S.C. §1536(a)(2) (emphasis added). The designation of the Mid-Atlantic NIETC was plainly an "agency action" authorized by DOE. As such, the Department was obligated to consult with FWS prior to promulgating its Final Rule.

The Supreme Court has read the Section 7 mandate extraordinarily broadly, holding that:

> One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act. Its very words affirmatively command all federal agencies "to *insure* that actions *authorized, funded,* or *carried out* by them do not *jeopardize* the continued existence" of an endangered species or "*result* in the destruction or modification of habitat of such species. . . ." 16 U.S.C. § 1536 ... This language admits of no exception.[30]

[30] *TVA v. Hill*, 437 U.S. 153, 173 (1980) (emphasis in original).

There are numerous federally protected plant and animal species solely within the New York portion of the Mid-Atlantic NIETC.[31] The impact of DOE's actions on these species triggers the Section 7 consultation requirement. *See* Fed. Reg. 19926, 19958 (June 3, 1986) (stating that "'Jeopardize the continued existence of' means to engage in an action that reasonably would be expected, directly or *indirectly*, to reduce appreciably the likelihood of both survival and recovery of a listed species in the wild...") (emphasis added). DOE was required, therefore, to ask FWS for information about protected species which may be present in the proposed areas. 16 U.S.C. § 1536(c)(1).

The Department's failure to comply with the ESA mandates that the Final Rule be set aside in its entirety.

II. Designation of the Mid-Atlantic NIETC Was in Direct Contravention of the Language and Intent of Section 216(a) of the FPA and Was Arbitrary, Capricious and Contrary to Law.

A. As Required by Subtitle B of the Modernization Act, DOE Failed to Consult with and Consider Alternatives or Recommendations from Interested Parties, Including Affected States and Regional Entities Identified in the Act, Prior to Designation of the Mid-Atlantic NIETC.

Only *after* DOE considers "alternatives and recommendations from interested parties (including an opportunity for comment from affected States)," *may* it designate a particular geographic area experiencing existing transmission capacity constraints or congestion as a National Corridor.[32] Even then DOE is required to "study and issue the report in consultation with any appropriate agency referred to in" Subtitle A of the Modernization Act. Thus, consultation with and consideration of alternatives or recommendations from interested parties is a condition precedent to NIETC designation.

DOE failed to adequately consult with necessary parties interested in the draft Mid-Atlantic Area National Corridor, particularly with respect to the state of New York. DOE indicates it met once with the NYPSC in Albany, New York on December 20, 2005. However, DOE had no further meetings with the NYPSC, even after it issued its Congestion Study on August 8, 2006 identifying a large area of New York State as a Critical Congestion Area, and issued the May 7, 2007 Notice regarding the draft-Mid-Atlantic National Corridor, which resulted in the designation of an even larger area of the state as a congestion corridor. Given the drastic change between the Critical Congestion Area in New York identified in the Congestion Study and the vast agglomeration of counties designated as part of the Mid-Atlantic NIETC, DOE should have engaged in extensive consultation with the NYPSC to comply with the requirements of Section 216(a)(2).

Although DOE has indicated that it held a conference call and a meeting with staff from the Governor's office, it has not indicated that it has met with any other New

[31] *See* attached listing from the New York State Department of Environmental Conservation.
[32] FPA § 216(a)(2), codified at 16 U.S.C. § 824p(a)(2).

York State officials, or any representatives of the numerous towns, counties and other municipalities or public interest groups affected by the Mid-Atlantic NIETC and any transmission lines that could potentially be sited within that Corridor. As discussed above, CARI is comprised of seven counties encompassed within the Mid-Atlantic NIETC as well as five public interest organizations. The DOE made no attempt to meet with any of CARI's members or hold public meetings in the counties or towns in which CARI's members are located or where a proposed transmission line seeking such designation would be located.

Indeed, the DOE initially scheduled only three public meetings with regard to the draft Mid-Atlantic Area National Corridor, which encompasses states and the District of Columbia. Only after a public outcry, did DOE agree to hold three additional public hearings. With respect to New York, however, the DOE chose to hold such meeting in Rochester – not in any of the counties that would be most directly impacted by the Mid-Atlantic NIETC – that is, those counties that lie in the path of NYRI's line, the only transmission line proposed in that NIETC that has indicated it is seeking federal siting approval.

Furthermore, the DOE failed to adequately consult with regional entities prior to issuing its Final Rule. For instance, the New York Independent System Operator ("NYISO") stated in its comments on the Congestion Study that no National Corridor need be designated in the State of New York.[33] The NYPSC and others also recommended that no national corridor be designated until further analysis and studies were conducted.[34] Other commenters proposed more discrete and more narrow corridors than the vast draft Mid-Atlantic NIETC.[35] Without giving any explanation for rejecting such alternatives and recommendations, the DOE merely stated that it had considered them, and stated that the draft Mid-Atlantic NIETC was warranted as proposed.[36]

The DOE also specifically rejected any non-transmission-related alternatives, claiming that because of the statutory framework, it was not required to consider them.[37] There is no basis in the language of Subtitle B of the Modernization Act nor the legislative history behind the statute to support such a conclusion. The statute clearly provides that after the DOE considers the alternatives and recommendations proposed by interested parties, it *may* issue a report designating a NIETC. The statute, thus, specifically contemplates that DOE could issue a report where it determines that no NIETC is necessary because alternative non-transmission options are viable solutions to any identified transmission congestion or capacity constraints.

Nothing in the legislative history of the statute indicates that non-transmission alternatives need not be considered. The House Report regarding the Energy Policy Act of 2005 ("EPAct") recognizes that the purpose of Act was both to "promote *energy*

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[33] 72 Fed. Reg. at 25,860.
[34] *Id.*
[35] *Id.*
[36] *Id.* at 25,861.
[37] *Id.* at 25,845.

conservation and increase the availability of energy supplies nationwide" and that the statute would "encourage *energy production and demand reduction* . . ."[38] Similarly, the Senate Report on the Act states that the purpose of the statute was to "provide a comprehensive national energy policy that *balances domestic energy production with conservation and efficiency efforts* . . ."[39] Indeed, in addition to Subtitle B of Title XII of the Act, which granted DOE the authority to designate NIETC as part of its transmission infrastructure modernization provisions, other titles of the Act provide for energy management and efficiency and incentives to increase energy production. It was clearly the intent of Congress that these provisions work together as part of a comprehensive energy policy.[40] Not only that, but the canons of statutory construction require that the provisions of a statute be read together as a harmonious whole, interpreted within their broader statutory context in a manner that furthers the overall statutory scheme.[41] Reading the various titles of the Act together, DOE must consider non-transmission alternatives and recommendations proposed by interested parties in order to comply with its statutory mandate.

Lastly, the authorizing language contained in the Modernization Act explicitly requires that DOE "conduct the study and issue the report in consultation with any appropriate regional entity referred to in section 215." "Consultation" is "a meeting for deliberation, discussion, or decision." Webster's New Universal Unabridged Dictionary, Barnes & Noble Books (1994). It implies "talking over a situation or a subject with someone to decide points in doubt." *Id.* "To consult is to seek from a presumably qualified personal or impersonal source advice, opinion, etc." *Id.*

Contrary to the clear instruction form Congress, DOE did not consult with appropriate regional entities but elected instead to "send letters inviting consultation" only to the "affected Regional Entities" and subsequently had a single conference call of unreported duration with but two of the three letter recipients. The Final Rule should be abrogated due to the Department's failure to comply with its statutory directive.

B. The Mid-Atlantic NIETC Designation Was Not Warranted In New York State Because Mechanisms Already in Place are Operating To Relieve Transmission Congestion.

Section 216(a)(2) of the FPA provides that the Department *may* designate any geographic area experiencing electric energy transmission constraints or congestion that adversely affect consumers as a NIETC.[42] The Department is not compelled to make any such designation and should not have done so in New York State.

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[38] House Rep. No. 109-215 at 169 (emphasis added).
[39] Sen. Rep. No. 109-78 at 1 (emphasis added).
[40] House Rep. No. 109-215 at 169-71; Sen. Rep. No. 109-78 at 1.
[41] *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme").
[42] FPA § 216(a)(2), codified at 16 U.S.C. § 824p(a)(2).

The effect of a NIETC designation is to delineate geographic areas within which, under certain circumstances, FERC may authorize the construction or modification of electric transmission facilities.[43] Such exercise of federal licensing authority would be in contrast to the long history of state licensing of electric transmission facilities. In fact, Section 216(g) provides that nothing in that section precludes any person from constructing or modifying any transmission facility in accordance with state law.[44] There is no legal or institutional barrier to the licensing or construction of new or modified transmission facilities under state law without the designation of a National Corridor.[45] So it is in New York State, where the Mid-Atlantic NIETC includes 47 of New York's 62 counties. Transmission facilities have been licensed by the New York Public Service Commission for 37 years under Article VII of New York's Public Service Law.[46]

Moreover, since December 1, 1999, the bulk electricity grid in New York State (the New York Control Area) has been operated by NYISO, which also serves as a focal point for transmission system planning.[47] DOE's ill informed, outdated and erroneous perspective on congestion notwithstanding, NYISO is already acting to address transmission needs in a much more certain and organized way than will result from the Mid-Atlantic NIETC designation in New York.

The NYISO is responsible for operating the State's bulk electricity grid in accordance with reliability standards and criteria set by the North American Electric Reliability Corporation ("NERC"), the Northeast Power Coordinating Council ("NPCC") and the New York State Reliability Council ("NYSRC")[48]. These standards and criteria, mandatory under federal law, determine the amount of transmission capability and generation capacity that must be available to meet expected demands for electricity.[49] The standard for resource adequacy in New York State is that electricity use will not be involuntarily curtailed due to insufficient *transmission* or generation more than once in 10 years.[50]

The NYISO manages the grid interconnection process for transmission and generation developers. The NYISO also manages a Comprehensive Reliability Planning Process ("CRPP") designed to ensure the adequacy and reliability of the bulk electricity grid over a 10-year planning horizon. The first phase of this process is a Reliability Needs Assessment which identifies potential transmission and power generation needs. The second phase elicits responses (potential solutions) to the identified needs. These

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[43] *Id.* § 216(b), codified at 16 U.S.C. § 824p(b).
[44] *Id.* § 216(g), codified at 16 U.S.C. § 824p(g).
[45] That is not to say that every transmission proposal, no matter how ill conceived, damaging to the environment, or burdensome to rate payers will be approved by the NYPSC.
[46] Article VII of New York's Public Service Law was enacted in 1970.
[47] NYISO is, with respect to operation of the grid and coordination of the State's transmission system planning, the successor to the New York Power Pool.
[48] New York Independent System Operator, Power Trends 2007, May 3, 2007, at 5 ("Power Trends").
[49] *Id.*
[50] New York Independent System Operator, Power Trends 2007, May 3, 2007, at 5 ("Power Trends").

potential solutions are in the form of market based and regulated backstop proposals to meet the identified needs.[51]

The 2005 Reliability Needs Assessment,[52] which provides the basis for the New York portion of DOE's Congestion Study, outlined reliability needs for years 2006 through 2010. The identified needs are located in downstate New York, from the lower Hudson Valley through New York City. The NYISO issued its initial request for market based solutions to these needs on December 22, 2005 and requested that the four identified downstate responsible transmission owners also submit regulated back stop solutions by February 15, 2006.[53]

On March 1, 2006, the NYISO made a preliminary determination that the solutions received did not fulfill the reliability needs for the entire 10-year study period and accordingly requested alternative regulated solutions by April 17, 2006.

Solutions provided by the transmission owners for the first five year base case (2006-2010) included new transmission and generation, transmission system upgrades and additions, and other programs (such as demand side management) to meet transmission system reliability needs.[54]

The responsible transmission owners also provided solutions for the second 10 years (2011-2015). Three market solutions involving new generation capacity in New York City were submitted.

Four alternate regulated solutions were also submitted. Three of the four involved new or upgraded transmission facilities.[55]

The NYISO found that the transmission owner's updated plans, in conjunction with the deferred retirement of a generating unit, meet resource requirements through 2010.[56] The NYISO concluded that the market proposals are not required to maintain the Loss of Load Expectation criteria through 2014.[57] Considering the alternative regulated responses, the NYISO found that if the three market responses remain on schedule, then the New York Control Area would maintain the Loss of Load Expectation criteria throughout the entire 10-year study period except for the last year 2015.[58]

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[51] *Id.* at 14-15.

[52] New York Independent System Operator, Comprehensive Reliability Planning Process (CRPP) Reliability Needs Assessment, December 21, 2005.

[53] The NYISO also requested that market participants and other stakeholders submit market based responses by then, New York Independent System Operator, Comprehensive Reliability Plan 2005: A Long Term Reliability Assessment of New York's Power Plan, August 22, 2006, at 21 ("Comprehensive Reliability Plan 2005").

[54] Comprehensive Reliability Plan 2005 at 22.

[55] *Id.* at 24-25.

[56] Comprehensive Reliability Plan 2005 at 32.

[57] *Id.* at 39. Loss of Load Expectation (LOLE) is a statistical measure of how long, on average, available capacity is likely to fall short of demand.

[58] *Id.* at 44.

The NYISO process that led to the 2005 Reliability Needs Assessment and the companion 2006 Comprehensive Reliability Plan yielded sufficient proposals, found to be timely responses to the needs identified in the 2005 Reliability Needs Assessment.[59]

The 2007 NYISO Reliability Needs Assessment concluded that transmission and generation resources will be adequate through 2010. Load growth, generator retirements and voltage driven transmission constraints in the Lower Hudson Valley into New York City and Long Island could cause power deficiencies in the State's southeast region by 2011 and could become more serious by 2016.[60] According to the NYISO, the transmission system transfer capability in southeastern New York is affected by a degradation in the voltage performance of the transmission system in the southeastern region.[61] During peak demand conditions, the transfer capability of the transmission system is limited below the full capability of the lines because of the risk of voltage instability.[62]

According to the NYISO, the decline in the voltage performance of the system is occurring because of demand growth, retirement of power plants and the lack of new power plants or transmission resources located below the north to south transmission interfaces. See map at Attachment A. The voltage performance of the system (and therefore the system transfer capability) can be improved by locally adding new reactive resources, such as new generating capacity, static Volt Ampere Reactive Compensators and new capacitor banks in select locations in the transmission and distribution system according to the NYISO.[63]

The 2007 Comprehensive Reliability Plan process is designed to produce a range of proposals, similar to those already submitted, to timely address needs on the 2010-2016 horizon.

On March 8, 2007, the NYISO solicited market-based and regulated back stop solutions to the needs identified in the Reliability Needs Assessment. According to its tariff authority, the NYISO has designated certain responsible transmission owners in southeastern New York to identify regulatory back stop solutions to these reliability needs, if no timely market-based solutions are available.[64]

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[59] Power Trends at 17.

[60] New York Independent System Operator, Comprehensive Reliability Planning Process (CRPP), 2007 Reliability Needs Assessment (Mar. 16, 2007).

[61] Power Trends at 22.

[62] *Id.* at 22.

[63] *Id.* at 22-23.

[64] *See* Letter from NYISO to Transmission Owners and other Customers and Interested Parties (Mar. 8, 2007), *available at* http://www.nyiso.com/public/webdocs/services/planning/reliability_assessments/2004_planning_trans_report/crpp_solicitation_letter.pdf

As of May 3, 2007, there were pending in the NYISO's interconnection queue, eleven proposals for reinforcement or upgrade to existing components of the transmission grid and five proposals for new transmission lines.[65]

On May 15, 2007, the NYISO acknowledged responses from the responsible transmission owners identified in the Reliability Needs Assessment and certain market based responses. NYISO, although it was still evaluating these responses, nonetheless, solicited Alternative Regulated Responses to ensure that all of the options for meeting reliability needs are identified and evaluated. Transmission owners and other developers may submit additional alternative regulated solutions.[66]

Moreover, the process is such that, upon any failure to identify or implement a market-based solution, the NYISO may, with the concurrence of the Public Service Commission, direct one or more responsible transmission owners to take action with respect to a regulated back stop solution or an alternative regulated solution.[67] Consequently, there is in New York State an existing and certain mechanism to address transmission constraints in southeastern New York State identified in the NYISO's Comprehensive Reliability Planning process.

No such certainty is provided by the Mid-Atlantic NIETC. DOE acknowledges that "[a] National Corridor designation is not a determination that transmission must, or even should, be built; it is not a proposal to build a transmission facility and it does not direct anyone to make a proposal."[68]

In light of the NYISO's Comprehensive Reliability Planning Process, its actions to address identified electricity system needs and its ability to direct responsible transmission owners to take action if need be, the Mid-Atlantic NIETC was unwarranted in the New York Control Area, which is managed by NYISO. It is also likely irrelevant, except to transmission project developers seeking a friendly licensing forum at FERC for corridor transmission projects that are so ill conceived they cannot be approved by the appropriate state licensing agency.

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[65] Power Trends. at 12.

[66] *See* Letter from NYISO to Transmission Owners and other Customers and Interested Parties (May 15, 2007), *available at* http://www.nyiso.com/public/webdocs/services/planning/reliability_assessments/2004_planning_trans_report/CRPP_solicitation_051507.pdf

[67] Power Trends at 14-17.

[68] 72 Fed. Reg. at 25,839.

C. Even if New York State Were Experiencing Transmission Congestion, the Mid-Atlantic NIETC Designation is Overbroad.

1. The Overbroad Mid-Atlantic NIETC Designation Is Inconsistent With the Presumption Against Federal Preemption.

Even assuming that there are some areas in New York State experiencing electric energy transmission congestion or constraints, the Final Rule runs afoul of the "presumption against preemption."[69] The presumption recognizes that preemption of state law is an "extraordinary power in a federalist system"[70] that radically alters the balance between state and federal authority. Accordingly, preemption analysis must begin with the assumption that "the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[71] This "presumption against preemption" has been applied particularly in those cases where Congress has legislated in a field that the states have "traditionally occupied,"[72] Here, authority over the construction and siting of electric transmission facilities has historically and exclusively been reserved to the States.[73]

The designation of the Mid-Atlantic NIETC is the cornerstone upon which FERC licensing of electric transmission facilities under Subtitle B of the Modernization Act is built. As a result, the exercise of authority granted to the Department to designate NIETC must be undertaken with reserve, consistent with the presumption against intrusion of the federal government into traditional areas of state authority except where there is a clear and manifest statement from Congress authorizing that intrusion.

Here, the designation of the Mid-Atlantic NIETC, a corridor that encompasses vast areas of the Mid-Atlantic states and is unnecessary to achieve the identification of transmission capacity constraints and congestion authorized by the Congress, is at odds with the notion that the federal intrusion into a field traditionally occupied by the states should be limited to only that necessary to achieve a clearly articulated Congressional purpose. The Final Rule adopted an expansive approach to corridor designation in a circumstance that commands a more judicious approach in light of the traditional role of the states in transmission planning and regulation, the authorization of the Congress to designate "corridors" experiencing capacity constraints or congestion, and the ability to exercise that authority consistent with a minimal intrusion into territory traditionally occupied by the states.

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[69] Courts have long "presumed that Congress does not cavalierly pre-empt state-law causes of action." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).
[70] *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).
[71] *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).
[72] *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Rice*, 331 U.S. at 230).
[73] *New York v. FERC*, 535 U.S. 1, 24 (2002) ("FERC has recognized that the states retain significant control over local matters.") (citing FERC Order No. 888 at 31,782 n.543 ("Among other things, Congress left to the States authority to regulate generation and transmission siting").

2. The Final Rule Determined the Area of Congestion by Utilizing Out-Of-Date and Incomplete Data and Performing Erroneous Interpretations and Analyses.

Subtitle B of the Modernization Act requires DOE to conduct a nationwide study of electric transmission congestion and to issue a report on the study which may designate a NIETC.[74] DOE's role under Section 216 is to identify transmission congestion and constraint problems, and the geographic areas in which these problems exist.[75] The Congestion Study gathered historical congestion data and modeled future congestion for years 2008 and 2011 for the Eastern Interconnection. Based on the historical data and the modeling results, the Congestion Study classified the most significant congestion areas in the country. The Atlantic coastal area from metropolitan New York City through northern Virginia was identified as the Mid-Atlantic Critical Congestion Area.[76] The Mid-Atlantic NIETC is based on the Congestion Study's Mid-Atlantic Critical Congestion Area but expands north and west into New York State - far beyond the Critical Congestion Area addressed in the Congestion Study. In making this expansion, DOE acted arbitrarily, in a manner unwarranted by the facts, and in excess of its statutory authority. DOE relied on outdated information. It ignored more recent data brought to its attention in comments on the Congestion Study. It neglected additional data and programs that will reduce congestion. Moreover, it interpreted the data incorrectly.

As to congestion in New York State, DOE relied in part on data provided in the NYISO's December 2005 Comprehensive Reliability Planning Process, Reliability Needs Assessment and the 2004 Intermediate Area Transmission Review.[77] Consequently, the actual data relied upon by DOE is 2004 vintage.[78] Moreover, the December 21, 2005 Reliability Needs Assessment understated the use of certain emergency procedures. This error resulted in an overstatement of the Loss of Load Expectation and consequently an overstatement of reliability needs.[79]More current and accurate data is contained in the NYISO's more recent Comprehensive Reliability Plan issued in August 2006.[80]

The August 2006 Comprehensive Reliability Plan identifies, analyzes and outlines solutions to meet the State's power needs and to affirm the integrity of New York's bulk power grid over a 10-year period, from 2006 to 2015. The underlying Reliability Needs Assessment determined that additional resources would be needed over the 10-year study period in order for the New York Control Area to comply with all applicable reliability criteria. As a result, the NYISO initiated a request for solutions, as set forth above in the more detailed discussion of this process. Market participants responded with a range of

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[74] FPA §216(a), codified at 16 U.S.C. §824p(a).
[75] *Id.*,
[76] *See, supra*, n.4.
[77] New York State Independent System Operator, 2004 Intermediate Area Transmission Review of the New York State Bulk Power Transmission System (Study Year 2009), March 10, 2005; *see also* 72 Fed. Reg. at 25,858, Table VIII-3.
[78] 72 Fed. Reg. at 25,854.
[79] Comprehensive Reliability Plan 2005 at 19-20.
[80] *See* Comprehensive Reliability Plan 2005, *supra*, n.59.

solutions that included transmission owner updated plans, market proposals and alternative regulated responses. Based on the market proposals, responsible transmission owner updated plans, modeling refinements and continued operation of generating assets previously scheduled for retirement, the NYISO determined that sufficient resource additions to the New York Control Area are planned or under development such that the control area can meet reliability criteria for the first five years and through four of the second five years of the NYISO study period.[81] This is three years beyond the period (2011) modeled by DOE for the Eastern Interconnection.

Without providing any insight into its analysis or rationale for its decision, DOE simply concluded that NYISO's August 2006 Comprehensive Reliability Plan did not alter DOE's analysis regarding the proposed Corridor designation.[82] In doing so, DOE appears not to have considered data that suggest future constraints and congestion will not be as severe as DOE's modeling predicted. Designating the Mid-Atlantic NIETC in New York without thorough consideration of the NYISO's data and analysis was arbitrary, capricious and unwarranted by the facts.

Before designating a corridor encompassing most of New York State, DOE was required to consider not just the NYISO's more recent data and analyses but also the effects of two important energy programs that will affect transmission congestion by reducing demand for electricity.

On April 19, 2007, New York Governor Elliot Spitzer announced a comprehensive plan for reducing electricity use by 15 percent from the levels forecast for 2015.[83] The Governor's plan includes a 15 percent reduction in electricity demand coupled with increasing the supply of environmentally sustainable power.[84] The Governor's plan includes economic incentives for utilities to encourage energy conservation among their customers, adopting new and broad ranging energy efficiency standards for appliances and buildings and by using state purchasing power to increase demand for renewable energy sources.[85] The Governor expects these efforts to eliminate the otherwise expected increase in state energy demand by 2015.[86] Before DOE designated a congestion corridor in New York, it was required to consider the effect of Governor Spitzer's "15 by 15" energy conservation plan on reducing projected transmission constraints and congestion.

A second important development has occurred in New York City. New York City's Mayor Michael Bloomberg has proposed his own energy plan that will affect congestion by reducing the projected demand for energy.[87] The Mayor has proposed to

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[81] Comprehensive Reliability Plan at 39-40.
[82] 72 Fed. Reg. at 25,854.
[83] NY Governor's Press Release (Apr. 19, 2007); *see also*, Speech of Governor Eliot Spitzer (Apr. 19, 2007), *available at* http://www.ny.gov/governor/keydocs/CleanEnergySpeech-final.pdf
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *See* Mayor Bloomberg's PlaNYC, *available at* www.nyc.gov/html/planyc2030/downloads/pdf/report_energy.pdf

amend the City Charter to require City investment of 10 percent of its energy costs in reducing the energy consumed by city operations. The target is to reduce City government's energy consumption by 30 percent within 10 years. A new City Energy Planning Board would set demand reduction targets as part of the City's overall energy plan. A principal focus of the plan is to reduce energy use in city buildings. A City Energy Efficiency Authority would direct all of the City's efficiency and demand reduction efforts, including expanded peak load management programs. Through several related initiatives, the City is looking to reduce peak demand by 25 percent. Increasing the supply of clean power in the City is also part of the plan and the City Energy Planning Board's responsibility.

So, too, is a plan for repowering in-city generating capacity and building additional generation facilities within existing sites.[88] Also included is the option of building new power plants outside the City limits that are completely dedicated to providing electricity directly to the City's electricity grid. Construction of 800 megawatts of in-city distributed generation by 2030 is also part of the plan. Most of these initiatives would be realized east and south of the Central East and Total East and UPNY-SENY interfaces and would have a significant impact on reducing congestion into the metropolitan New York City area relative to otherwise projected levels of congestion.[89] Before designating a Mid-Atlantic NIETC even in southeastern New York State, DOE was required to consider the effects of New York City's PlaNYC energy initiatives. Failing to do so was arbitrary, capricious and unwarranted by the facts.

In addition to outdated data, a number of uncertainties and errors underlie the Mid-Atlantic NIETC designation. First and foremost, projections of future constraints and congestion, in addition to being at variance with the clear statutory direction to consider areas *experiencing* capacity constraints or congestion, are inherently uncertain. They are dependant on assumptions, interpretations, and modeling methodologies to describe the future.

In light of these uncertainties, it is no surprise that Congress directed DOE to consider the designation of corridors in areas "*experiencing* electric energy transmission capacity constraints or congestion."[90] Having gone beyond the Congressional direction, the Mid-Atlantic NIETC suffers the deficiencies and errors of those projections.

Inexplicably, DOE saw no need to speculate about any effects the Mid-Atlantic NIETC designation would have on the market for electricity,[91] but at the same time premised its Mid-Atlantic NIETC designation on speculation that new sources of generating capacity (especially wind power) will be developed in western New York, so as to provide a "source" terminus for its "source and sink" extension of the congestion corridor beyond metropolitan New York City. Nothing could be more speculative than

[88] *Id.*
[89] *See* Map at Attachment A.
[90] FPA § 216(a)(2), codified at 16 U.S.C. § 824p(a)(2).
[91] 72 Fed. Reg. at 25,845.

the proposition that an area of *potential* supply[92] provides the basis for a corridor that reaches west and north across New York State.

In addition, the Mid-Atlantic NIETC designation suffers from the following deficiencies, many of which have been identified by other commenters and dismissed by DOE in an arbitrary and capricious manner.

- DOE concedes the possibility that there is a disparity between its modeled results and real world experience. The NYISO has made the observation that DOE's projections of congestion in upstate New York are overstated relative to its conclusions concerning congestion in southeastern New York State. The NYISO has indicated that DOE's projections are plainly contrary to NYISO's actual experience.[93]

- The interface limits which underlie the proposed Mid-Atlantic area designation in New York State provide a bias to the congestion conclusion when compared with an analysis based on operational interface limits. Operational interface limits, which are more reflective of operating reality, yield lower levels of confirmed congestion when compared with the planning interface limits used by DOE to justify its congestion conclusions in New York State.[94]

- The direct current (DC) model used to predict congestion for the Eastern Interconnection does not reflect the grid system and does not take into account voltage related constraints. As noted above, the NYISO attributes great significance to voltage driven constraints in southeastern New York State. Addressing voltage related constraints does not require far flung facilities remote from existing transmission facilities and therefore did not require speculation regarding potential source areas in order to address a voltage based constraint or to define the areal extent of the corridor.[95]

- DOE concedes a misrepresentation of the NYISO's 118 percent installed capacity requirement and the way it is applied only to upstate load instead of to load across the entire State of New York. Consequently, the capacity balance for the NYISO-managed New York Control Area is incorrect in a way that directly affected conclusions regarding the need for capacity additions.[96]

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[92] 72 Fed. Reg. at 25,847. The inconsistency of DOE's approach is illustrated by the treatment of planned transmission capacity as contrasted with potential supply. To determine the presence of congestion, DOE modeled only transmission projects that are actually approved and those that are far enough along in the siting and construction process to be considered firm in the load flow. Yet, for purposes of fixing the proposed corridor end points, DOE credits areas where a *potential* source of supply is *likely* to be located. Indeed in this respect, DOE even credits areas that merely have available power supply. *Id.* at 25,848.

[93] *Id.* at 25,858 (citing Comments of NYPSC and NYISO on the DOE Congestion Study).

[94] *Id.*

[95] *Id.* at 25,853 (citing Comments of NARUC, NYPSC, and PAPUC on the DOE Congestion Study).

[96] 72 Fed. Reg. at 25,859 (citing Comments of NYPSC on the DOE Congestion Study).

- The GE-MAPS Market Model Assumptions which underlie the Mid-Atlantic NIETC designation misstates how New York determines operating reserves.[97]

- DOE employed unrealistic assumptions regarding fuel price differentials between coal, natural gas and oil-fired generation and as a result has inflated congestion estimates, in some cases based on short term weather phenomena (e.g. hurricanes Katrina and Rita).[98]

- DOE conceded that it needs to develop more representative data instead of the scheduled flows of electricity from Canada which formed part of the basis for the Mid-Atlantic NIETC designation. The data used by DOE represent only 12 months of historical experience and are not likely to be typical[99] or representative.

- The use of congestion rents overstated the cost of congestion and therefore overstated the potential effect on consumers.[100]

Moreover, the Mid-Atlantic NIETC designation suffers from the following additional deficiencies.

- DOE's use of 2004 NYISO data significantly impacted the congestion analysis results. The 2004 data represented lower than actual megawatt (MW) ratings for New York transmission interfaces. That more readily leads to a congestion conclusion than does 2006 or later data that show higher MW ratings.

- DOE misinterpreted a transmission constraint on one element of the UPNY-SENY interface, a major transmission interface for power flowing from Upstate New York to Southeastern New York, as a constraint leading to congestion on all elements of the UPNY-SENY interface.

- DOE misinterpreted the transmission constraint on the Central East interface as a limit on the Total East interface, a major path for power flowing from Western New York to Eastern New York. In fact, though all the transmission elements of Central East are also elements of Total East, both interfaces are distinct, with different types of limits

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[97] *Id.* at 25,859.
[98] *Id.* at 25,854 (citing Comments of ODEC, ConEd, the Toll Brothers, PEC and EPSA on the DOE Congestion Study).
[99] *Id.* at 25,859 (citing Comments of NYPSC on the DOE Congestion Study).
[100] *Id.* at 25,852 (citing Comments of NYISO, NYPSC, and the Toll Brothers on the DOE Congestion Study).

- DOE relied on its contention that the trend in New York transmission limitations is a shift in congestion from downstate to upstate on the basis of a comparison between planning and operating limits. In fact, the trend, based on NYISO data and assessment of 2012 conditions, is that upstate limits increase in the future, leading to less congestion, while downstate limits stay about the same.

- DOE misapplied UPNY-SENY and Total East interface constraints to the Critical Congestion Area definition and included portions of Sullivan, Upper Orange, Delaware and Schoharie Counties. The resulting Mid-Atlantic NIETC designation is therefore broader than is supported by the data and analysis.

3. As Designated, the Mid-Atlantic NIETC Is the Result of a Flawed Approach That Produced a Flawed and Over-Expansive Corridor.

Section 216(a) of the FPA authorizes the Department to designate NIETC in any geographic area experiencing electric transmission constraints or congestion that adversely affects consumers.[101]

In designating the Mid-Atlantic NIETC, DOE adopted a "source and sink" approach.[102] That approach underlies a Final Rule that includes large portions of New York State that are clearly not experiencing electric transmission constraints or congestion. Indeed, much of the area designated in New York has no electric facilities of any kind located therein.

In spite of the FPA's clear direction to determine whether to designate a geographic area experiencing electric energy transmission *constraints or congestion*[103] and DOE's repeated disclaimer of interest in determining solutions to constraints or congestion,[104] DOE nonetheless defined the geographic area of the Mid-Atlantic NIETC by focusing on energy supply solutions, some of which are potential, not real. In defining its designation "corridors" according to the solution to energy short fall in the sink (by focusing on energy supply sources) rather than the problem (the constraint or congestion referred to by the Congress), the resulting Mid-Atlantic NIETC designation is unwarranted by the facts and in excess of DOE's statutory authority.

Rather than focusing on existing physical constraints or transmission pathways and interconnections that represent constraints or cause congestion, DOE has broadened its approach to corridor designation. The Mid-Atlantic NIETC is based not only upon existing physical transmission constraints, which exist in relatively small and discrete

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[101] FPA § 216(a), codified at 16 U.S.C. § 824p(a).
[102] DOE's use of the terms "source" and "sink" should not be confused with the same terms used in transmission service requests for open access to existing facilities.
[103] FPA §216(a), codified at 16 U.S.C. §824p(a).
[104] 72 Fed. Reg. at 25,839.

areas of New York, but also upon a DOE constructed fantasy world of potential electricity sources and transmission routes that connect them to load centers.[105]

Yet again, the Secretary's wholesale misreading of the Modernization Act and the intent of Congress demands that the Final Rule be abrogated in its entirety. DOE's authority to designate the Mid-Atlantic NIETC originates in the Electricity Modernization Act of 2005 and more specifically in Subtitle B of the Modernization Act titled "Transmission Infrastructure Modernization." To modernize is to refurbish and to update. Nothing in the name of the Act, the Subtitle or the language of either directed the DOE to designate or create new transmission corridors or corridors to theoretical sources of electrical power. The charge was, under very limited circumstances, to allow for the designation of corridors that may benefit from a limited and discrete federal role in the siting of transmission lines.

DOE's source and sink approach has two elements grounded in reality. One is the energy "sink" of the metropolitan New York City area. The other is the existing transmission system across the State and into the New York City and Long Island load zones. If a designation was to be made, it is the areas of congestion or constraint in these load zones that should have been designated. DOE's Congestion Study identified constraints based on a review of existing transmission studies and expansion plans available prior to publication of the Congestion Study. DOE appropriately considered underserved demand in the "sink" area. But, DOE did not stop there, as it should have. Rather, DOE went to the second statutory criteria - consumer affect - before satisfying the first, by finding existing constraints and resulting congestion. DOE identified areas within New York that have under-utilized, lower-cost generation and identified constraints that limit not the supply of electricity, but the flow of lower priced electricity.[106] Doing so and designating the Mid-Atlantic NIETC as it did based on that concept was in excess of DOE's statutory authorization.

In doing so, DOE ignored its own definition of "congestion" - the denial of desired transmission service over a transmission path, and of "constraint" - the choke point on the transmission system that causes such denial.[107]

Moreover, in defining the Mid-Atlantic NIETC, DOE looked beyond the problem Congress directed that it identify and focused on a solution, but not the solution identified and directed by Congress. Selecting as its source area not only areas of "under-used" economic generation capacity, but also locations that have merely the potential for substantial development of wind and other generation capacity, DOE made the Mid-Atlantic Area National "corridor" broad enough to encompass a range of potential projects and a range of potential routes to facilitate theoretical but non-existing west to east energy flow corridors.[108] That decision was in excess of DOE's statutory authorization.

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[105] 72 Fed. Reg. at 25,848-49; *see also* at 25,896-25,903.
[106] *Id.*
[107] *Id.* at 25,843.
[108] 72 Fed. Reg. at 25,848, 25,901.

In order to define the Mid-Atlantic NIETC, DOE identified the reality of the New York City energy "sink"; noted that improvements need to be made in the area to which electricity is to be delivered (the New York City sink); and then, in order to solve the congestion problem, constructed a fantasy world of potential energy source development projects that might be developed and might be located anywhere in western, central or northern New York where there is some type of available fuel. Having created a fantasy world in which new energy sources might be developed virtually anywhere in New York State, except in the southeastern portion of the State where the energy is most needed, the DOE's Mid-Atlantic NIETC designation was premised upon connecting the Department's fantasy sources to the New York City energy sink by means of fantasy transmission routes between the two.

Doing so was unwarranted by the facts and represents an abuse of the discretion granted the Department to identify geographic areas experiencing transmission constraint or congestion.

Unfortunately, the above approach is consistent with the DOE view that the total absence of a transmission line connecting two existing nodes or hindering the development of a potential generation source constitutes a capacity constraint, regardless of whether there is congestion.[109] So, in the Alice-in-Wonderland world DOE has constructed to justify the extraordinarily expansive Mid-Atlantic NIETC, capacity constraints were arbitrarily and capriciously defined to include the absence of transmission equipment between two or more existing or imaginary nodes.

In short, the Final Rule reflects DOE's approach to identify the Mid-Atlantic Critical Congestion Area and its New York Metropolitan energy "sink"; postulate the potential development of energy sources practically anywhere in New York State outside the New York Metropolitan area and then justify the creation of the expansive Mid-Atlantic NIETC based on the absence of transmission capacity between the theoretical source areas and the energy sink.

That cannot be what Congress had in mind when it authorized the Department to designate any geographic area experiencing electric energy transmission constraints or congestion in an effort intended to modernize existing transmission infrastructure. If there was to be designation at all, it should have been limited to those discrete areas of constraint along existing transmission paths where choke points on the path cause a denial of transmission service over that transmission path.

As an additional justification for its broad designation, DOE pushed its interpretation even further beyond its statutory authorization and designated any area experiencing transmission capacity constraints or congestion that adversely affects consumers. To "give[] meaning to all of the terms used in the statutory provision" DOE submits it can make a showing of the existence of a constraint (i.e., the choke point on the

[109] *Id.* at 25,844.

transmission system) by showing the total absence of the transmission system itself.[110] DOE further contends that it made the statutorily required findings of congestion "regardless of whether there is congestion" and made the statutorily required finding of adverse consumer affect "without the need for any additional demonstration of adverse effects on consumers" beyond its declaration that congestion exists.[111]

As a result, the Mid-Atlantic NIETC rests upon an analytical approach that allows the identification of a transmission system constraint where there is no transmission system; a finding of congestion regardless of whether there is congestion; and a conclusion of adverse consumer effects without any demonstration that they exist.

That approach provides no rational basis for the Mid-Atlantic NIETC. It was unwarranted by the facts, in excess of statutory authority and an abuse of discretion.

D. DOE Failed to Establish Congestion in New York State Has an "Adverse Effect" on Consumers.

Regardless of whether DOE could show that New York State is actually experiencing current transmission congestion or capacity constraints, and properly limited that congestion finding to only those areas experiencing such congestion or constraints, under Schedule A of the Modernization Act, DOE must further show that the congestion or constraint "adversely affects consumers."[112]

DOE has claimed "any congestion, by definition, thwarts consumer choice, because it prevents users of the transmission grid from completing their preferred power transactions."[113] That interpretation is not supported by the statutory language. If Congress anticipated that "any" congestion would have an adverse effect, then, the phrase "that adversely affects consumers" would be superfluous, a result that flies in the face of long standing canons of statutory construction.[114]

DOE asserts that the statute gives it discretion to designate a NIETC upon a showing of the existence of "persistent" congestion "without any additional demonstration of adverse effects on consumers."[115] DOE's interpretation, however, arbitrarily focuses on whether transmission congestion is "worth fixing" or "isolated or transient instances" that do not "warrant consideration of transmission expansion," rather than attempting to determine what Congress actually meant by "adverse effect."[116]

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[110] 72 Fed. Reg. at 25,844.

[111] *Id.* DOE's interpretation of the statute "allows for a National Corridor designation where there is a constraint [but no transmission line] that adversely affects consumers, even though there is no present congestion." *Id.* (emphasis added).

[112] FPA § 216(a)(2), codified at 16 U.S.C. § 824p(a)(2).

[113] 72 Fed. Reg. at 25,843.

[114] *See Connecticut Nat. Bank v. Germain*, 503 U.S. 249 (1992) ("[C]ourts should disfavor interpretations of statutes that render language superfluous").

[115] 72 Fed. Reg. at 25,844.

[116] *Id.*

Contrary to the presumption against preemption, DOE chose to adopt the most liberal interpretation of the language proposed by commenters who are or represent power producers, and who have argued that the statutory standard for designating a corridor "appears to be relatively low" and that "if an area is congested, consumers are therefore adversely affected by higher costs, and consumers should be afforded the potential relief available through Corridor designation."[117] Given the fact that NIETC designation is the first step leading to federal preemption over an area of siting authority traditionally occupied by the States, DOE was required to narrowly and strictly construe the statutory language and its authority.

DOE should have found that the phrase "congestion adversely affecting consumers" means more than just congestion or persistent congestion, but congestion that has an actual detrimental effect on consumers through denial of service. Even higher prices for electricity, in some cases, would not necessarily fit the definition of "adverse effect." For instance, DOE has observed that electricity prices in metropolitan New York and Long Island are higher than electricity prices in upstate New York. Nevertheless, as observed in more detail below, the economy in downstate New York continues to thrive while the economy in upstate New York communities continues to deteriorate. Thus, higher prices in such case do not necessarily equate to "adverse effect." Merely because consumers in downstate New York do not pay the same price as consumers in upstate New York does not mean that those downstate consumers are "adversely affected." In that case, a high price means the market is operating properly to allocate electricity as a resource. More demand in downstate New York translates into higher prices for the supply. This is the cornerstone of the market system and the system of supply and demand. The proper operation of the market for electricity could not have been the kind of "adverse effect" intended by Congress in Section 216(a)(2). The idea that downstate consumers are adversely affected because they must rely on power from "less preferred generating sources"[118] misses the point. If power is reaching the load pocket experiencing the congestion, few consumers likely care about the source of the power. That they pay a higher price rather than reduce their usage is testament to the truth of that proposition.

DOE also liberally construed the phrase "constraints that adversely affect consumers" to include not only constraints that cause persistent congestion, but also any constraint that "hinders the development or delivery of a generation source that is in the public interest" regardless of whether there is congestion and without the need for any additional demonstration of adverse effect on consumers.[119] Such an interpretation again ignores the presumption against preemption and would necessarily encompass large swaths of areas not actually experiencing "present" or "existing" congestion, which is clearly contrary to the statutory language and intent.

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[117] *Id.* at 25,842 (citing Comments of LS Power, Edison Electric Institute, and Electric Power Supply Association on the DOE Congestion Study).
[118] *Id.* at 25,843.
[119] *Id.* at 25,844.

DOE claims that its liberal and broad interpretation of the statutory language is supported by the "objective and structure of the statute," which "evince concern about the need to strengthen transmission infrastructure throughout the Nation."[120] DOE looks to find a purported objective while ignoring the plain language of the statute. If Congress had intended the mere existence of congestion or capacity constraints to warrant the designation of a NIETC, it would not have inserted the qualifying phrase "that adversely affects consumers" into the statute. However, because it did so qualify the kind of congestion constraints that would warrant such designation and because of the presumption against preemption, DOE must interpret the language in a way that narrowly construes the federal government's preemptive authority and gives effect to the qualifying language.

Properly and narrowly construing the language of the statute, DOE should have found, as the Connecticut Attorney General argued in his comments, that designations should be reserved to "limited and extraordinary circumstances in which transmission constraints so severely impact the national interest that Federal intervention may be warranted."[121] DOE failed to show any such "limited and extraordinary circumstances" warranting designation of the Mid-Atlantic NIETC.

E. None of the Statutory Considerations in Subtitle B of the Modernization Act Warranted Designation of the Mid-Atlantic NIETC.

Only after determining that a certain geographic area is experiencing electric energy transmission congestion or capacity constraints that adversely affects consumers, does DOE have the discretion to choose whether or not to designate a National Corridor based "on the totality of the information developed, taking into account relevant considerations, including the considerations identified in FPA section 216(a)(4), as appropriate."[122] Here, the designation of the Mid-Atlantic NIETC was not warranted by any of the factors listed in Section 216(a)(4).

1. Economic Considerations Did Not Warrant the Designation of the Mid-Atlantic NIETC, But Rather, Weighed Against It.

DOE claims that economic development considerations warranted designation of the wide-ranging Mid-Atlantic NIETC. DOE based that assertion on the proposition that consumers in metropolitan New York City and Long Island, or downstate New York, are paying higher prices for electricity than consumers in upstate New York and that because high electricity prices add to the cost of living or doing business in an area, they will "retard the area's economic growth and competitiveness."[123]

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[120] *Id.*

[121] *Id.* (citing Comments of the Connecticut Attorney General on the DOE Congestion Study).

[122] *Id.*

[123] 72 Fed. Reg. at 25,895.

First, it is important to note that relieving congestion will not necessarily lower prices for consumers in downstate New York. Although relieving congestion may militate against the cost associated with paying for power in high demand, the cost of building the transmission line to relieve the congestion will ultimately be passed on to the consumer. Thus, in the end, consumers will be paying the price for congestion - either as a premium or as a cost of transmission line construction.

Second, DOE's proposition defies logic and simply ignores the reality of the economy in the state of New York. The reality is that in New York State, the opposite of what, in fact, the Department asserts is occurring. In downstate New York, where electricity prices are highest, the economy is booming. In upstate New York, electricity prices are higher than in most other parts of the country, but lower than in New York City. Lower electricity prices in upstate New York, however, have not translated to a strong economy. Rather, there can be little dispute with the fact that the economy in upstate New York is in dire need of revitalization. A recent report by the Brookings Institution Metropolitan Policy Program observed that out of 302 U.S. cities studied, seven upstate New York cities that are encompassed by the broad Mid-Atlantic Area National Corridor fall within the 65 economically weakest cities in the United States.[124] The report listed Albany, Binghamton, Buffalo, Rochester, Schenectady, Syracuse and Utica among the 65 weakest cities in the country based on the growth rate in their employment, annual payroll, and number of establishments as well as the median household income, per capita income, unemployment rate, poverty rate, and labor force participation rate of their citizens.[125]

Economic development considerations, thus, argue against the Mid-Atlantic NIETC as designated. The designation will serve to retard upstate New York's economic development -- not that of downstate. The addition of transmission lines in the rural communities of upstate New York will likely reduce the value of the property near the line. NYRI, one of the transmission companies that has proposed a specific project in upstate New York, has conceded that its proposed transmission lines would increase the rates of electric utility ratepayers in those communities where the line will be sited, as well as other upstate New York communities.[126] Lower property values and higher electricity costs will only further impede economic development in those upstate communities already suffering from stagnant economies.

Not only that, but proposed transmission lines like NYRI's threaten potential economic development that might occur in those upstate communities. A prime example is that of a planned semiconductor and nanotechnology industrial center known as the Marcy NanoCenter in Oneida County, New York. This center is anticipated to result in economic development, job creation and increased revenues for Oneida County. NYRI's

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[124] Brookings Institution Metropolitan Policy Program, Restoring Prosperity: The State Role in Revitalizing America's Older Industrial Cities, 2007, at 10-19.

[125] *Id.*

[126] *See* NYRI's Article VII Application, *supra*, n.2, App. P (MAPS Study, Draft Report to NYRI for Economic Evaluation of the NYRI HDVC Project) at 2.3, 2.4.

proposed power line would bisect the Marcy NanoCenter site right where micro device manufacturing clean rooms and support structures would be located.

NYRI's proposed line would also cross numerous areas of New York State that are recognized for their natural resources and which are traveled and utilized by nature lovers and tourists alike, including the Adirondack Park, the Catskill Park, the Thousand Islands Region, the Fingerlakes Region, the Upper Delaware Scenic and Recreational River Corridor, and the Mongaup Valley Wildlife Management Area, among others. New overhead transmission lines like NYRI's would provide no electricity supply to upstate New York, increase competition for and the cost of existing upstate New York energy sources, and degrade the environmental quality of the landscape. They are not positive economic forces in upstate economies increasingly dependent on tourism.

Thus, the designation of the Mid-Atlantic NIETC will allow for the construction of power lines that would adversely affect economic development. These economic development considerations clearly did not support the Mid-Atlantic NIETC, as designated, but rather, weighed against it.

2. Reliability Considerations

With respect to reliability, DOE stated in its May 2007 Notice that NYISO published a new Reliability Needs Assessment in 2007 as part of its Comprehensive Reliability Planning which indicates that the constraints limiting delivery of electricity to southeast New York pose a threat to reliability by 2011.[127] Thus, DOE contended that consumers in the Mid-Atlantic Critical Congestion Area face threats to reliability if existing congestion problems are not addressed.[128] DOE pointed to this as a potential problem, but arbitrarily and capriciously ignored the NYISO's action to address reliability needs.

As discussed above in more detail, as part of its Comprehensive Reliability Planning Process, the NYISO has called upon all of the State's privately owned transmission operators and the Long Island Power Authority to identify regulatory back stop solutions for reliability needs from 2012 to 2016.[129] Just as the NYISO process that led to the 2005 Reliability Needs Assessment and the companion 2006 Comprehensive Reliability Plan yielded sufficient proposals and timely responses to the needs identified in the 2005 Reliability Needs Assessment, the current 2007 Comprehensive Reliability Plan process will produce a similar range of proposals to timely address needs on the 2010-2016 horizon. Upon any failure to identify or implement a market-based solution, the NYISO may, with the concurrence of the NYPSC, direct one or more responsible transmission owners to take action with respect to a regulated back stop solution or an alternative regulated solution.

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[127] 72 Fed. Reg. at 25,895.
[128] *Id.*
[129] Power Trends at 15-16.

Consequently, there is a process already existing in New York State to address constraints identified in the NYISO's Reliability Needs Assessment process. Furthermore, conditions of congestion reflect a failure to meet reliability criteria, and a reliability needs assessment identifies conditions of congestion. The solutions addressing reliability will also address congestion. Thus, the designation of the Mid-Atlantic NIETC was not necessary and not warranted based on reliability needs.

3. Diversification of Supply Needs

Diversification of supply needs did not support the Mid-Atlantic NIETC designation. DOE claimed that because most of the existing generation fleet in downstate New York is fueled by oil or natural gas, the absence of transmission facilities prolongs the area's current high dependence on oil and natural gas fuel sources. DOE reasoned that new transmission facilities would enable more hydro-, wind-, or coal-based electricity to reach downstate load centers. DOE submits the Mid-Atlantic NIETC designation was warranted to achieve that result.[130]

DOE ignored current plans to diversify supply in New York City. Indeed, New York City Mayor Michael Bloomburg's energy plan for the City calls for increasing the supply of clean power in the City and the repowering of in-city generating capacity and building additional generation facilities within existing sites. Also included in the plan is the option of building new power plants outside City limits that are completely dedicated to providing electricity directly to the City's electricity grid. Construction of 800 megawatts of in-city distributed generation by 2030 is also part of the plan.[131] These new projects have potential for diversifying energy sources just as well as potential projects in upstate New York. Thus, the need to diversify the supply of energy alone did not support the designation of the Mid-Atlantic NIETC in New York.

4. Energy Independence and National Energy Policy

The designation of the Mid-Atlantic NIETC will do little to serve the Nation's energy independence or national energy policy. As described above, the legislative history behind the statute shows that the purpose of the Act was to further a comprehensive energy policy that not only increases the availability of energy supplies and encourages energy production, but also achieves demand reduction and conservation and efficiency efforts. The Mid-Atlantic NIETC, which is a result of DOE having refused to consider any non-transmission-related alternatives such as demand side management or new generation projects, does not support that comprehensive energy policy.

Furthermore, designation of the Mid-Atlantic NIETC will enable private transmission companies, such as NYRI, to bypass state and local siting procedures and acquire federal eminent domain authority. However, in the case of NYRI, the company is not a domestic company bringing more U.S. power to the grid, but rather a company

[130] 72 Fed. Reg. at 25,896.
[131] *See, supra*, n.95.

owned and controlled by a Canadian national, holding as one of its options the transmission of electricity generated in Canada. Reliance on another country for power certainly does nothing to achieve energy independence. Nor does a NIETC designation that, in part, will link load pockets in metropolitan New York City and Long Island with sources of hydroelectric power outside the country, in Canada.

The Mid-Atlantic NIETC does not support energy independence or the Nation's energy policy and therefore, was not warranted on those bases.

5. National Defense and Homeland Security

The DOE has provided no rationale for why or how the Mid-Atlantic NIETC enhances national defense and homeland security other than its circular reasoning that because so many people live in the vast area encompassed by the Mid-Atlantic NIETC, which includes a "large number of military and other facilities," any "deterioration of the electric reliability or economic health of this area would constitute serious risk to the well-being of the Nation."[132]

Again, the proposed NYRI transmission line is prime example of why national defense and homeland security argue against designation of the Mid-Atlantic NIETC. As mentioned above, the transmission company sponsoring this line is owned and controlled by a Canadian national, but not much else is known about the company or its owner. DOE has given no indication that it has seriously considered the national security implications of giving a foreign-owned company the opportunity to bypass state and local siting procedures or the power of federal eminent domain to acquire property to site that line.

Nor has DOE indicated that it has evaluated the potential security risks associated with certain types of transmission versus other types, such as aboveground transmission versus underground transmission. For instance, the NYRI line, as proposed, would be 190-mile aboveground transmission line, and presumably a potential prime target for terrorists.

DOE failed to show how or why the Mid-Atlantic NIETC either enhances national defense or homeland security.

F. Duration

The Final Rule arbitrarily allows the Mid-Atlantic NIETC to remain in effect for as long as 12 years, despite the fact that Section 216(a) requires DOE to conduct a study of electric transmission congestion every three years. As can be seen with respect to the solutions elicited by the NYISO, the ongoing projects in New York City and elsewhere in New York State described above, the DOE Congestion Study was out-of-date before it was released and the Mid-Atlantic NIETC is based on that outdated and now incomplete study.

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[132] 72 Fed. Reg. at 25,896.

Adequately assessing the energy supply situation in the state or even in a metropolitan area like New York City is a moving target. Corridor designations should change to reflect the dynamic nature of the electric transmission system. Thus, if the Mid-Atlantic NIETC is not abrogated in its entirety, the designation should remain operative for no longer than the three years granted for DOE to update its Congestion Study.

Conclusion

Based on the important policy, procedural and technical deficiencies that attend the Mid-Atlantic NIETC, the Final Rule designating the Mid-Atlantic NIETC was arbitrary, capricious, unwarranted by the facts, in excess of statutory authority, otherwise not in accordance with law, and without observance of the procedure required by law and should be abrogated in its entirety.

Respectfully submitted,

Kevin C. Murphy, Esq
John F. Klucsik, Esq.
Brenda D. Colella, Esq.
GILBERTI STINZIANO HEINTZ & SMITH, P.C.
Attorneys for Communities Against Regional Interconnect; Broome County, New York; Madison County, New York; and Orange County, New York
555 East Genesee Street
Syracuse, NY 13202-2159
315-442-0100

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